

Exclusion of Death-Scrupled Jurors and International Due Process

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The exclusion from capital juries of certain prospective jurors who are death-scrupled has been found by the U.S. Supreme Court not to violate any constitutional guarantee relating to a fair trial. In recent decades, international standards have become more refined on procedural guarantees required in capital cases. Death-qualification is of questionable validity under international standards, in particular the guarantee of trial by an impartial tribunal.

I. INTRODUCTION

The workings of capital juries in the United States have been evaluated by the courts under standards derived from provisions of the United States Constitution relevant to criminal trials. From the mid-twentieth century, the United States has promoted, at the international level, the elaboration of treaties that set standards for criminal trials. The United States has ratified such treaties, including the International Covenant on Civil and Political Rights, which provides an array of rights guarantees, including a right to a fair trial before an impartial tribunal.¹ In addition, and in part as a result of this treaty development, many due process guarantees applicable at a criminal trial have entered into the unwritten body of law known as international custom.²

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¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (providing, in art. 14, for an impartial tribunal, openness of court proceedings, a presumption of innocence, a right to be informed in detail of charges, an opportunity to prepare a defense, speedy trial, a right to defend in person or through counsel of choice including free counsel where required, a right to cross-examine prosecution witnesses and to compel attendance of defense witnesses, an interpreter without charge if required, protection against self-incrimination, special proceedings for juveniles, a right to appeal a conviction, compensation for punishment under a false conviction, protection against double jeopardy; in art. 15, protection against prosecution for an act that was not an offense at the time committed and against imposition of a penalty heavier than was in force, a guarantee of a lighter penalty if, after sentencing, the legislature reduces the penalty for the offense; in art. 26, a guarantee to equal protection of the laws).

² *Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980) (finding a violation of customary human rights norm prohibiting arbitrary detention in case of a Cuban detained after arriving from Cuba); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Rev'd) § 702 (1987).

In international law, as in domestic law, the scope of rights guarantees is elaborated over time as decision-makers confront new sets of facts. To date, the exclusion of death-scrupled jurors, as practiced in U.S. courts during the jury selection process, has not been directly addressed by international decision-making bodies. The right to trial before an impartial tribunal, and perhaps other due process rights, are arguably violated by this practice. In the international community, many states have eliminated capital punishment and promote the concept that capital punishment must, as a matter of human rights law, be eliminated by other states.³ International decision-making bodies have said that, to the extent capital punishment is still used, procedural safeguards must be applied in a particularly scrupulous fashion.⁴

Against this background, this Article examines death-qualification of jurors as practiced in the courts of the United States. Potential jurors are asked, prior to being seated on a capital jury, whether they oppose capital punishment, and if so, whether that opinion might keep them from applying the law to the facts of the case. This practice has been challenged by capital defendants for producing a pro-prosecution jury. To date, state and federal courts have upheld the practice.⁵

This Article examines the reasons why death-qualification has been criticized as producing less than fair juries in the United States, and how the courts have responded to such criticism. It then examines death-qualification as a potential reason for improper convictions in capital cases. From there the Article explores the historical origin of the death-qualification process. Then it assesses death-exclusion against the international standard of fairness in capital cases and the international standard of an impartial tribunal.

II. CHALLENGES TO DEATH-QUALIFICATION

In the United States, if the accused in a capital case demands trial by jury, the jurors decide guilt or innocence and play a role, along with the judge, in determining the penalty.⁶ Potential jurors are asked, prior to being seated, whether they hold views in opposition to capital punishment that would prevent them from considering the case impartially.⁷

Exclusion of potential jurors on this basis is designed to ensure that all jurors will genuinely consider imposing a sentence of death in appropriate cases, and that

³ Sixth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, *opened for signature* Apr. 28, 1983, Europ. T.S. No. 114; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, *opened for signature* Dec. 15, 1989, GA. Res. 44/128, *reprinted in* 29 I.L.M. 1464.

⁴ See *infra* text accompanying notes 109–115.

⁵ See *infra* text accompanying notes 7–8.

⁶ *Ring v. Arizona*, 536 U.S. 584 (2002).

⁷ *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

they will not decline to find guilt out of concern that the accused may be executed. Potential jurors are seated even if they oppose capital punishment if they affirm that they are willing to consider imposing a sentence of death in the instant case, if they find that the accused is guilty and that death is the appropriate sentence under the law. Thus, those excluded are persons who oppose capital punishment to the point that they would not vote for it as the sentence, or who would vote against a finding of guilt.⁸

Defendants have challenged death-qualification arguing that it eliminates from jury service persons who are liberally inclined, and that it disproportionately eliminates women and racial minorities. Persons excluded, they say, are typically more inclined to believe that crime is a product of social conditions and upbringing, hence more likely to view mitigating circumstances seriously. Persons not excluded, they say, may take a "law and order" approach to criminal law issues. One capital defendant asserted that the jury that convicted him was a jury "organized to return a verdict" of guilty.⁹

Another capital defendant asserts: "The effect of the provision automatically excusing persons who are opposed to capital punishment means that the jury will be composed of persons whose attitude is more harsh and who are more prone to be vindictive in the enforcement of laws and the punishment of crime."¹⁰

A defense concern is that a death-qualified jury is more inclined, where testimony is in conflict, to give credence to prosecution witnesses over those for the defense. Persons excluded, they say, are more inclined to take seriously the concept of proof beyond a reasonable doubt. One critic of death-qualification wrote, "Jurors hesitant to levy the death penalty would also seem more prone to resolve the many doubts as to guilt or innocence in the defendant's favor than would jurors qualified on the 'pound of flesh' approach."¹¹

In addition, capital defendants argue that, apart from the character of the persons who are seated as jurors, the very process of questioning potential jurors, prior to trial, about the death penalty may predispose them to think, before hearing evidence, that the accused has committed a capital crime. They argue, in short, that death exclusion produces a "hanging jury." They argue that the jury that convicted them was more pro-prosecution than the jury they would have had if the case had been tried without a capital specification. To this extent, they say, death-qualification may encourage prosecutors to charge a case as capital in order to get a more compliant jury.

⁸ See *id.* at 523 n.21.

⁹ *Lockhart v. McCree*, 476 U.S. 162, 184 (1986) (Marshall, J., dissenting) (quoting defense argument).

¹⁰ *State v. Leland*, 227 P.2d 785, 797 (Or. 1951) (quoting defense brief that relied on an Oregon constitutional provision guaranteeing trial by an "impartial jury").

¹¹ Walter E. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEX. L. REV. 545, 549 (1961).

Such arguments, perforce, cannot go beyond conjecture.¹² An individual defendant convicted of capital murder by a jury from which some jurors were excluded as death-scrupled can never prove that a non-death-qualified jury would have decided the case to his advantage. Yet, procedures may be found inadequate if they hold the risk of unfairness, even if unfairness cannot be shown in a particular case. Further, it may be possible to ascertain that death-qualification does produce juries more prone to convict. Social scientists have weighed in on the issue by conducting experiments designed to determine if death exclusion affects the fact-finding process. One experiment focused on the impact of the process of questioning potential jurors. Two groups of persons were shown videotapes of jury selection in a hypothetical capital case. The videotape shown to the first group included jurors being death-qualified, but that segment was edited out of the videotape shown to the second. Each group was given a set of facts for a hypothetical penalty phase to follow a guilty verdict in the case and asked whether they believed the appropriate penalty should be death. Many more in the first group opted for a death sentence.¹³ A later experiment focused on the same issue and, similarly, found that a "death-qualified" group was more likely to recommend a sentence of death.¹⁴

One other experiment compared death-qualified jurors against non-death-qualified jurors in how they assessed evidence. One group of persons was determined as result of questions posed by the experimenters to be eligible to sit on a capital jury, while a second group was determined to be excludable for their views about capital punishment. Each group was then shown an identical videotape of a hypothetical criminal trial, involving conflicting testimony. Each group was asked to evaluate the evidence. The death-qualified jurors were more likely to accept prosecution evidence.¹⁵

Still another experiment focused on capital cases in which the defendant claims insanity, presenting the same facts to one group that would pass death qualification, and another that would not. The "death-qualified" jurors were less likely to acquit on grounds of insanity.¹⁶

¹² *Lockhart*, 476 U.S. at 172 (citing authors who say that the matter may not be proved in a scientifically precise fashion).

¹³ Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 126-28 (1984).

¹⁴ James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 279 (1988).

¹⁵ William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 103 (1984).

¹⁶ Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81, 88-89 (1984).

III. RESPONSE OF THE COURTS

The courts have given careful consideration to defense challenges and have assessed the data emanating from the experiments just recounted. They have weighed potential unfairness to the accused against what they view as a need to protect the integrity of the capital conviction process.

In *Lockhart v. McCree*, the U.S. Supreme Court considered data from a number of controlled experiments. While not finding this data conclusive, it said it would, for purposes of its opinion, assume "that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries."¹⁷ It held, however, "that the Constitution does not prohibit the States from 'death qualifying' juries in capital cases."¹⁸

The court focused on the issue of whether the use of a death-qualified jury violates the requirement that a jury represent a fair cross-section of the population. It said that excluded jurors do not constitute a "distinctive group" within the population, as that term was defined in prior decisions.¹⁹ It said that, regardless of the right to a jury representing a fair cross-section of the population, it must give priority to "the State's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial."²⁰

The court did not aver to the fact, although it was well aware of it, that unanimity is required for a conviction, hence a single juror adamantly opposed to capital punishment can prevent the return of a verdict of guilt. The result would be a hung jury, leaving the prosecution the option to re-try the case.

Dissenting in *Lockhart*, Justice Marshall accepted the evidence from experiments that the majority found equivocal and said that death-qualification skews the jury. Unlike the majority, which focused on the issue of a fair cross-section, Marshall focused on the requirement that a jury be impartial.²¹ He said that death-qualified jurors have a "pro-prosecution bias"²² and are "more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions."²³ Marshall also accepted the evidence that the process of questioning biases the panel: "[T]he very process of death qualification . . . focuses attention on the death penalty before the trial has even

¹⁷ *Lockhart*, 476 U.S. at 173.

¹⁸ *Id.*

¹⁹ *Id.* at 174.

²⁰ *Id.* at 175-76.

²¹ *Id.* at 193 (Marshall, J., dissenting).

²² *Id.* at 188 (Marshall, J., dissenting).

²³ *Id.*

begun" and as a result "predispose[s] the jurors that survive it to believe that the defendant is guilty."²⁴

Marshall, moreover, accepted the defense argument that allowing death-qualification may encourage prosecutors to seek a death sentence in order to get a more favorable jury: "The State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict."²⁵

In the District Court in *Grigsby*, the trial judge took evidence on the controlled experiments and concluded that death qualification produces juries "more prone to convict" than the ordinary jury and ruled that death-qualification may not be used on a guilt-phase jury.²⁶ On appeal, the U.S. Court of Appeals agreed with this conclusion about conviction proneness and affirmed.²⁷ The U.S. Supreme Court, while reversing, assumed *arguendo* that the two lower courts were correct on the facts. Thus, at all three levels in *Grigsby*, it was concluded either definitively, or provisionally, that death-qualification produces a jury more favorable to the prosecution, and less favorable to the accused, than in non-capital cases.

The *Lockhart* majority, although focusing primarily on the fair cross-section issue, did address the impartiality issue that Marshall found decisive. McCree had, to be sure, made arguments along these lines. Rejecting McCree's assertion, the majority said that it suffices if those selected for the jury are able to apply the law and find facts conscientiously. It is not required for impartiality, the court said, that the jurors reflect the range of views on capital punishment found through the relevant community.²⁸

IV. EXCLUSION AS A FACTOR IN IMPROPER CONVICTIONS

Death-qualification can also be examined as a possible cause of improper convictions in capital cases. One of the unresolved problems in the administration of capital punishment in the United States is protecting against improper convictions. Although improper convictions are inevitable in any system of justice, in capital cases they are especially damaging. If death-qualification leads to improper convictions, this consequence would need to be remedied.

There are serious indications that, for whatever reason or reasons, capital punishment is not administered fairly in the United States. Arbitrary application is widely perceived to be a problem. In a 2002 federal capital prosecution, a U.S. district judge dismissed the death specifications on the ground that the death

²⁴ *Id.*

²⁵ *Id.* at 185 (Marshall, J., dissenting).

²⁶ *Grigsby v. Mabry*, 569 F. Supp. 1273, 1323 (E.D. Ark. 1983).

²⁷ *Grigsby v. Mabry*, 758 F.2d 226, 229 (8th Cir. 1985).

²⁸ *Lockhart*, 476 U.S. at 178.

penalty as currently applied in the United States results in the execution of innocent persons and therefore violates due process of law.²⁹ The Court of Appeals reversed, relying on references to capital punishment in the text of the Fifth Amendment to the U.S. Constitution, which requires due process of law, and on U.S. Supreme Court case law upholding the constitutionality of capital punishment.³⁰ The Court of Appeals did not dispute the district judge's factual conclusion that innocent persons are executed.

U.S. Supreme Court Justice Harry Blackmun came to a similar conclusion. Recounting the court's efforts to provide for fairness and consistency in the application of capital punishment, Blackmun criticized his colleagues on the court for suffering from a "delusion that the desired level of fairness has been achieved."³¹ "[N]o combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies."³²

A UN investigator who analyzed capital punishment in the United States focused on arbitrary application as being a serious problem.³³ Concern about execution of the innocent in the United States prompted a judicial decision that limits extradition to the United States. The Supreme Court of Canada cited what it found to be the arbitrary application of the death penalty in the United States as a basis for refusing to extradite persons sought on capital charges in the United States. Unlike many other governments, the government of Canada had been willing to extradite persons sought on a capital charge who were found in its territory, even though a U.S.-Canada extradition treaty gave Canada the option to refuse. When such persons had sought judicial relief, the courts of Canada had taken the position that it was within the discretion of the Canadian government to decide to extradite.³⁴

In the 2001 case, however, the Supreme Court of Canada reversed itself. Two men wanted on a capital murder charge in Washington state fled to Canada. They were arrested in Canada, and the United States requested extradition. The government of Canada decided to extradite, even though it could have refused under the terms of Canada's extradition treaty with the United States. The men challenged the extradition order through lower Canadian courts, and finally to the Supreme Court of Canada.

The Supreme Court noted its prior rulings but said that the practice of the United States in implementing capital punishment had shown itself to be arbitrary

²⁹ *United States v. Quiñones*, 196 F. Supp. 2d 416 (S.D.N.Y. 2002); *United States v. Quiñones*, 205 F. Supp. 2d 256 (S.D.N.Y. 2002).

³⁰ *United States v. Quiñones*, 313 F.3d 49, 60-70 (2d Cir. 2002).

³¹ *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of petition for a writ of certiorari).

³² *Id.* at 1145.

³³ Elizabeth Olson, *U.N. Report Criticizes U.S. for "Racist" Use of Death Penalty*, N.Y. TIMES, Apr. 7, 1998, at A17.

³⁴ *Kindler v. Canada*, [1991] 84 D.L.R. 438 (Can.).

in the sense that the innocent ran a significant chance of being executed. The Supreme Court cited then recent information that a number of persons sentenced to death in Illinois were in fact innocent. It cited a U.S. Justice Department study showing racial disparity in the death penalty as applied under federal law. It cited the call by the Illinois governor for a moratorium on executions, a call premised on arbitrary application of the death penalty.³⁵

Under the Canadian constitution, a person may not be deprived of life "except in accordance with the principles of fundamental justice."³⁶ The court said that the death penalty, as applied in the United States, did not accord with those principles, in light of the arbitrariness of its use. The Court said, therefore, that the Canadian government was "constitutionally bound to ask for and obtain an assurance that the death penalty will not be imposed as a condition of extradition."³⁷

Improper convictions can be caused by a variety of factors. If death-qualified juries are conviction-prone, then this factor must figure high on the list of suspects. A jury in a capital case makes a substantial number of determinations. Hence, improper convictions can be of several sorts. One involves a person who had no involvement in the crime alleged, but where the jury accepts prosecution evidence of involvement. Another involves a person who had some involvement in the crime alleged but is not properly convictable of a capital offense. An example would be a person who committed a murder, but absent the aggravating circumstance alleged by the prosecution that renders the offense capital. Many state statutes render a murder a capital offense if committed in the course of a felony, such as a robbery.³⁸ If the prosecution alleges murder during a robbery, it may be that the person committed murder, but not during a robbery. A conviction-prone jury, particularly one that has found the individual guilty of murder, may be inclined to accept less than solid proof that it occurred during a robbery.

At the sentencing phase as well, juries are called upon to make determinations on a variety of factors that may go in favor of, or against, a sentence of death. After convicting of a capital offense, the same jury, by the practice followed in the United States, is next asked whether to recommend death or life imprisonment as the sentence. A death-qualified jury may recommend death in circumstances in which a non-death-qualified jury would not. The considerations at this stage involve fine judgments about circumstances that aggravate responsibility and those that mitigate responsibility. The jury is typically pressed by the prosecution to find the presence of various aggravating circumstances, and by the defense to find the presence of various mitigating circumstances. If the jury finds both, it may then have to engage in a kind of calculus between them, to decide if the aggravating circumstances outweigh the mitigating circumstances, to warrant a recommendation of the death penalty.

³⁵ *United States v. Burns*, [2001] 195 D.L.R. 1, 45-49 (Can.).

³⁶ CAN. CONST. art. 7 (Canadian Charter of Rights and Freedom).

³⁷ *Burns*, [2001] 195 D.L.R. at 58.

³⁸ *State v. Berry*, 650 N.E.2d 433 (Ohio 1995).

Mitigating circumstances may involve fine judgment calls. Factors commonly to be considered in mitigation are “youth of the offender,”³⁹ a lack of a “significant history of prior criminal convictions,”⁴⁰ whether the offender lacked “substantial capacity to appreciate the criminality of his conduct” as result of mental disease or defect,⁴¹ whether the accused is likely to be a threat in the future,⁴² or residual doubt as to guilt.⁴³

Having considered both aggravating and mitigating circumstances, the jury is asked by the law to weigh them against each other, before deciding whether to recommend a death sentence. That process, like the ascertainment of the various circumstances, is highly subjective. A jury whose members are proponents of capital punishment may be more likely to lean to the side of the death penalty as they engage in this calculus. One of the experiments on death qualification that found death-qualified jurors more likely to impose a death sentence also found that the difference could be explained in part by “differing receptivity to evidence supporting aggravating and mitigating circumstances, and evaluation of such evidence.”⁴⁴

V. ORIGIN OF THE DEATH-QUALIFICATION PROCESS

Excluding certain potential jurors in capital cases is widely viewed in the United States as necessary to the implementation of capital punishment. Since unanimity is typically required of juries, as it was at British common law, a single juror could thwart the implementation of capital punishment in a particular case.

Death-qualification, nevertheless, is a practice of recent origin in the long history of capital punishment. It was not used in the courts of Britain’s American colonies, or in the courts of England. No precedents are cited from British courts upholding an exclusion for cause of a death-scrupled juror. Prospective jurors in Britain were not asked their views on this subject or any subject.

Under British law, a prospective juror could be challenged for cause on one of four grounds: *propter honoris respectum* (where the juror was a peer), *propter defectum* (for want of qualification in respect of age), *propter affectum* (partiality based on a relationship with a party or from a stated partiality), and *propter delictum* (crime committed previously by the prospective juror).⁴⁵ The category *propter affectum* comes closest to death-qualification since it relates to partiality.

³⁹ OHIO REV. CODE ANN. § 2929.04(B)(4) (Anderson 2004).

⁴⁰ *Id.* § 2929.04(B)(5).

⁴¹ *Id.* § 2929.04(B)(3).

⁴² *Id.* § 2929.04(B)(7).

⁴³ Jennifer R. Treadway, Note, ‘Residual Doubt’ in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor, 43 CASE W. RES. L. REV. 215 (1992).

⁴⁴ Luginbuhl & Middendorf, *supra* note 14, at 279.

⁴⁵ E.B. BOWEN-ROWLANDS, CRIMINAL PROCEEDINGS ON INDICTMENT AND INFORMATION (IN ENGLAND AND WALES) 210 (1910).

However, it was not used to determine whether potential jurors had reservations about capital punishment, or to exclude them.

The courts of the American colonies, and then of the independent United States, followed the British practice in grounds for challenge, and in an absence of routine questioning of prospective jurors. Death-qualification was devised, however, in the United States in the early nineteenth century, where it appeared initially in scattered statutes and court decisions. In an 1820 federal murder prosecution, tried as a capital case, two prospective jurors, when called to be sworn, "appeared to be Quakers, and excepted to themselves as disqualified, because they were conscientiously scrupulous of taking away life, and did not think themselves impartial in a capital case."⁴⁶ The trial judge excluded the pair. The accused, after being convicted, moved for a new trial. Joseph Story, sitting as a circuit judge hearing the motion, denied it, both on grounds of unfairness to the prospective jurors, and on grounds of upholding the possibility of securing a conviction:

[T]o compel a Quaker to sit as a juror on such cases, is to compel him to decide against his conscience, or to commit a solemn perjury. Each of these alternatives is equally repugnant to the principles of justice and common sense. To insist on a juror's sitting in a case when he acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice.⁴⁷

Story cited no precedent. The issue of excluding the two prospective jurors had apparently not been raised by the prosecution, but was handled by the trial judge *sua sponte* in response to the statements by the two prospective jurors. Quakerism had been practiced in the American colonies, particularly in Pennsylvania, from the late seventeenth century, so the phenomenon of Quakers serving as jurors was not new.⁴⁸

The earliest reported case in which the prosecution raised the matter by moving to exclude a juror for cause was *Commonwealth v. Leshner*, which involved a capital murder prosecution in a state court of Pennsylvania. At the time in Pennsylvania, in conformity with British practice, there was no procedure to ask jurors their beliefs about capital punishment. Nonetheless, a prospective juror told the judge, apparently spontaneously, "[t]hat he had conscientious scruples on the subject of capital punishment, and that he would not, because he conscientiously could not, consent or agree to a verdict of murder in the first degree, death being

⁴⁶ *United States v. Cornell*, 25 F. Cas. 650, 655 (C.C.D. R.I. 1820) (No. 14,868).

⁴⁷ *Id.* at 655–56.

⁴⁸ ELBERT RUSSELL, *HISTORY OF QUAKERISM* 108–25 (1942).

the punishment, though the evidence required such a verdict.”⁴⁹ Upon hearing this statement, the prosecutor challenged for cause and the trial judge excused the man from jury service.⁵⁰

The jury convicted for manslaughter, whereupon Lesher moved for a new trial because of the exclusion of the prospective juror. Four judges of the Pennsylvania Supreme Court, sitting as a trial court, heard and denied the motion. One of their number, Chief Judge Gibson, dissented.

The *Lesher* court’s analysis proceeded from the categories used in England for exclusion of jurors. Not surprisingly, the focus was on the category *propter affectum*. The point of difference between the majority and Gibson was the scope of challenges *propter affectum*. Gibson, grounding his view on British precedent, said that *propter affectum* related only to partiality based on a factor relating to the accused as an individual, and not to partiality based on “an abstract proposition.”⁵¹ Relying on Lord Coke, Gibson said that all the examples Coke cited under *propter affectum* “are instances of favour or malice as regards the person,” in other words, “favour or malice” towards the person of the accused.⁵² To permit the prosecutor to challenge a death-scrupled prospective juror would, said Gibson, amount to changing the common law.⁵³

The three-judge majority replied to Gibson that he could cite no precedent for limiting a challenge *propter affectum* to a view of a prospective juror that related only to a specific party. Moreover, they argued Gibson could cite no case in which a challenge made to a death-scrupled prospective juror had been overruled. The majority reasoned by analogy from the exclusion of a juror partial to the accused as an individual:

[T]he mischief is the same whether the prejudice of jurors is general or special: there is the same perversion of truth, the same profanation of oaths, the same farce acted under the show of well and truly trying, the same prostitution of the solemn forms of criminal justice, and the same prostration of the law. If there is any thing in this distinction between abstract predetermination to acquit a criminal in spite of truth and law, and a particular prejudice applicable to one case only, that difference is, in my opinion, rather against the argument; because he whose judgment is warped by accidental error or misinformation, may, perhaps, give up his prejudices when he comes to know all the circumstances of the case, which it will be utterly hopeless to expect from him whose disregard of

⁴⁹ Commonwealth v. Lesher, 17 Serg. & Rawle 155 (Pa. 1828).

⁵⁰ *Id.*

⁵¹ *Id.* at 163 (Gibson, C.J., dissenting).

⁵² *Id.*

⁵³ *Id.* at 165.

law and of truth is founded upon no misrepresentation of persons or of facts; but is rooted in the conscience, and made a part of his religion.⁵⁴

The *Lesher* majority may have been correct that no precedent could be cited in which a judge had rejected a prosecutor's challenge to a death-scrupled prospective juror. At the same time, the majority could not demonstrate that a prosecutor had ever challenged a death-scrupled prospective juror, or that a trial judge had ever excluded a death-scrupled juror for cause. Nonetheless, the decision in *Lesher* set Pennsylvania law on a course it follows to this day.

In New York the matter of Quakers serving as jurors was addressed by statute, a fact that suggests that the common law did not provide for the exclusion of death-scrupled jurors. By an 1801 statute, "no Quaker or reputed Quaker shall be compelled to serve as a juror upon the trial of any indictment for treason or murder."⁵⁵ Later, the statute was expanded to include persons other than Quakers: "Persons of any religious denomination, whose opinions are such as to preclude them from finding any defendant guilty of an offense punishable with death, shall not be compelled or allowed to serve as jurors on the trial of an indictment for any offense punishable with death."⁵⁶

An 1835 New York case appears to have been one of the first in which a prosecutor asked to *voir dire* prospective jurors. The trial judge granted the request, allowing the prosecutor to inquire of prospective jurors whether they "had conscientious scruples against finding a verdict of guilty for an offense punishable with death."⁵⁷ Three answered in the affirmative, although none were members of a religious denomination holding a position against capital punishment.⁵⁸

The court construed the New York statute to require the exclusion of a person, regardless of religious affiliation, who could not render a guilty verdict if the consequence would be a death sentence:

It is not the opinions of the denomination which render the juror unfit to serve, but his own opinions . . . such a person is unfit; he has prejudged the question; he has made up his verdict without hearing the evidence, and ought to be excluded upon common law principles. It would be a solemn mockery to go through the forms of a trial with such a jury, or even with one such juror. The prisoner is sure to be acquitted independent of the question of guilt or innocence. It would be a misnomer to call such a proceeding a trial.⁵⁹

⁵⁴ *Id.* at 158.

⁵⁵ *People v. Damon*, 13 Wend. 351, 354 (N.Y. Sup. Ct. 1835).

⁵⁶ *Id.* (citing 2 REV. STAT. 734, § 12 (1813)).

⁵⁷ *Id.* at 351.

⁵⁸ *Id.*

⁵⁹ *Id.* at 354–55 (Savage, C.J.).

In an 1845 case in Louisiana, no statute had been adopted on death-scrupled jurors, so the court resolved the issue on common law principles. Several jurors had, with the court's permission, been asked by the prosecuting attorney "whether they had any conscientious and religious scruples against finding a verdict of guilty, in any case involving the life of the accused."⁶⁰ When they answered in the affirmative, the trial judge removed them for cause. Responding to the defense argument "that no such ground of recusation is known to the common law," the court quoted Littleton: "The rule of the common law is, that the juror must stand indifferent as he stands unsworn."⁶¹ The court continued, "He cannot be said to stand indifferent between the State and the accused, upon a trial for a capital crime, when, from his religious belief and conscientious scruples he cannot convict, and is therefore previously determined to acquit."⁶²

The Louisiana court had to admit that it could find no precedent:

No adjudicated case upon this point is found in the common law reports, probably because opinions opposed to capital punishment do not prevail in England. But an English judge would not hesitate, in a capital case, to reject jurors professing such opinions, upon the common law principle, that they did not stand indifferent⁶³

The court was taking the common law position that a juror who was "not indifferent" based on some relationship to the parties and expanding it to say that a death-scrupled juror was "not indifferent."

By the late nineteenth century, exclusion for cause of death-scrupled prospective jurors became accepted practice in the United States.⁶⁴ Death-qualification was practiced, reported the U.S. Supreme Court in 1892, "by the courts of every State in which the question has arisen, and by express statute in many States."⁶⁵

VI. ABSENCE OF DEATH-QUALIFICATION IN BRITISH PROCEDURE

British law knew no formal procedure whereby the death-scrupled could be identified or excluded. There was no procedure, comparable to what developed later in American practice, for inquiry as a matter of course into the beliefs of

⁶⁰ *State v. Kennedy*, 8 Rob. 590 (La. 1845).

⁶¹ *Id.* at 594 (citing EDWARD COKE, COMMENTARY UPON LITTLETON 155, a.).

⁶² *Id.* at 594-95.

⁶³ *Id.* at 595 (citing 1 Chitty, Common Law 544, Bacon's Abridgment, Juries, G.5.).

⁶⁴ See Annotation, *Prejudice against Capital Punishment as Disqualifying Juror in Criminal Case*, 1912A AM. ANN. CAS. 786 (1912); FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 664 (9th ed. 1889); see also Oberer, *supra* note 11, at 546-47 (1961).

⁶⁵ *Logan v. United States*, 144 U.S. 263, 298 (1892).

prospective jurors.⁶⁶ Nonetheless, there was a route whereby, in at least certain cases, prospective jurors were excluded, though informally. In cases of particular interest to the Crown, it engaged, on occasion, in what came to be called “jury vetting,” meaning that it investigated prospective jurors to determine if they would be hostile to the Crown position.⁶⁷ The Crown had a right to ask such a prospective juror to “stand by,” meaning that the person would be called for service only if the remainder of the venire failed to produce enough jurors. There was no judicial oversight of the “stand by” procedure.

It is conceivable that Crown counsel may have excluded from capital juries persons thought to be opposed to capital punishment by asking them to “stand by,” perhaps after “vetting” to ascertain their opinions. There is, however, no evidence that such was done. The Crown’s right to ask a prospective juror to “stand by” was to be exercised sparingly.⁶⁸ The Crown appears to have resorted to these informal methods of excluding jurors in politically sensitive cases. There is no indication that it was done in cases lacking a political character.

In England, unless it were obvious from appearance or statements offered by the potential juror, Crown counsel would not know that a particular potential juror opposed capital punishment. Evidence is lacking that the views of prospective jurors were ascertained by any procedure, formal or informal, or that those whose views might come to light were excluded.

In 1813, the sheriff of London wrote a remarkable book about British juries. Sir Richard Phillips was an ardent champion of juries as “the bulwark of all the people against oppression.”⁶⁹ A critic of the harshness of British penal law, Phillips described the process whereby he, as sheriff, compiled jury rolls and summoned jurors.⁷⁰ He described in detail the process whereby jurors were called and seated.⁷¹ Nowhere did he suggest that potential jurors were asked about any beliefs or that they were excluded by the Crown because they held views that may have inclined them to be lenient towards the accused. Given Phillips’ zeal for the

⁶⁶ RUPERT CROSS & PHILIP A. JONES, *AN INTRODUCTION TO CRIMINAL LAW* 360 (1964) (describing process whereby jurors are sworn).

⁶⁷ GEOFFREY ROBERTSON, *FREEDOM, THE INDIVIDUAL, AND THE LAW* 357 (1993); Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 36 (Neil Vidmar ed., 2000); ANDREW SANDERS & RICHARD YOUNG, *CRIMINAL JUSTICE* 562 (2000) (referring to contemporary practice, stating, “Whether authorised or unauthorised jury vetting is widespread or takes place only in cases which are particularly important or sensitive is impossible to know.”).

⁶⁸ Attorney General’s Guidelines On The Exercise By The Crown Of Its Right Of Stand By, (1988) 3 All E.R. 1086; STEVE UGLOW, *CRIMINAL JUSTICE* 175 (1995); Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 36 (Neil Vidmar ed., 2000).

⁶⁹ SIR RICHARD PHILLIPS, *ON THE POWER AND DUTIES OF JURIES, AND ON THE CRIMINAL LAWS OF ENGLAND* 1 (1813).

⁷⁰ *Id.* at 38–70.

⁷¹ *Id.* at 109–21.

jury system, and his own stated inclination towards leniency in penal matters, one suspects that had such practice been common, he would have noted it.

Jeremy Bentham shared Phillips' zeal for the British jury and his concerns about Crown manipulation, devoting his first book to the subject, and citing Phillips in support.⁷² But Bentham focused on the special juries that were called to sit in cases of anti-government libel, not to juries as used in felony trials generally.

Contrary to the view of the Louisiana court in *State v. Kennedy*, public opposition to capital punishment in England was widespread and had to be reflected in the views of those called for jury service. Quakerism was practiced from the mid-seventeenth century in England.⁷³ With death as the predominant penalty for felony, British juries were widely thought to find facts more favorable to an accused than was warranted, to avoid capital punishment.⁷⁴ This was especially so in larceny cases, where the difference between felony larceny (a capital offense) and petty larceny (a non-capital offense) was based on the value of the items stolen. Jurors frequently found the value to be below the cutoff point to spare the life of the accused.⁷⁵ It cannot be ascertained whether particular jurors made such determinations out of opposition to capital punishment.⁷⁶

Crown counsel had to know, particularly in a felony larceny case, that public opinion opposed capital punishment for the accused. Jurors would be hostile to convicting the accused, regardless of whether the jury included persons opposed to capital punishment in principle. Had there been a procedure for questioning potential jurors for their opinions about capital punishment for felony larceny, and a practice of excluding any who said they could not impose it on the accused, there would have been exclusions in large numbers.

Only one British case has been found in which a death-scrupled juror was excluded. The case dates from 1857. A juror, after being sworn in a capital case, spontaneously informed the trial judge that he had scruples against capital punishment. The Crown asked the trial judge to order the juror to stand by. The defendant asked that the Crown be required to show cause.⁷⁷ The judge addressed the juror, saying, "Undoubtedly, if you feel you cannot do your duty, you are quite

⁷² JEREMY BENTHAM, *ELEMENTS OF THE ART OF PACKING, AS APPLIED TO SPECIAL JURIES, PARTICULARLY IN CASES OF LIBEL LAW* (1821).

⁷³ ELBERT RUSSELL, *HISTORY OF QUAKERISM* 30–45 (1942).

⁷⁴ Sally Lloyd-Bostock & Cheryl Thomas, *The Continuing Decline of the English Jury*, in *WORLD JURY SYSTEMS* 56 (Neil Vidmar ed., 2000).

⁷⁵ Roger D. Groot, *Petit Larceny, Jury Lenity and Parliament*, in *THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND: THE JURY IN THE HISTORY OF THE COMMON LAW* 47 (John W. Cairns & Grant McLeod eds., 2002).

⁷⁶ THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800*, at 64 (1985) (stating, with regard to the acquittal rate in larceny cases, that it is likely that many "sprang from mercy and from deeply ingrained notions of how social harmony was to be maintained through composition with, rather than ultimate rejection of, the offender").

⁷⁷ *Mansell v. Queen*, 120 Eng. Rep. 20, 23 (1857).

right in saying so, and had better withdraw.”⁷⁸ The juror withdrew, and the judge ordered he be withdrawn.⁷⁹

On appeal, the defendant assigned as error the fact that the juror’s service had been curtailed in this fashion. The King’s Bench said there was no error in the exclusion of the juror: “the Court was bound, on the prayer of the counsel for the Crown, to order him [the juror] to stand by. We here attach no weight to what Jabez Philpotts [the juror] said; and we consider this a challenge by the Crown without assigning cause, . . .”⁸⁰ The King’s Bench commented, negatively, on the fashion in which the trial judge handled the matter: “Nor do we attach any weight to the remark which fell from the learned Judge, although it be unnecessarily set out upon the record.”⁸¹ The King’s Bench viewed the exclusion of the juror as pursuant to a peremptory challenge, rather than exclusion because of views about capital punishment.

This case raises the possibility that peremptory challenges were used to exclude the death-scrupled. However, Crown counsel, as indicated, had no way routinely to ascertain the views of prospective jurors. As a result, it is not likely that peremptory challenges could have been used, except in the rare case, to exclude the death-scrupled.

The United States is alone in allowing the questioning of prospective jurors about their views: “The law in the United States,” writes one analyst of juries, “stands almost alone in taking practical cognizance of all forms of bias through pretrial questioning of jurors by the judge or judge and opposing counsel.”⁸² The “stand by” or “stand aside” practice remains in some Commonwealth countries but was abolished in Canada and Ireland.⁸³

VII. INTERNATIONAL STANDARDS ON JURY SELECTION

The foregoing analysis of the development of death-qualification permits an analysis of its lawfulness under contemporary standards of justice. Those standards involve judicial constructions of rights guarantees, as well as treaty-based rights guarantees. No position is found in treaties on death-qualification, and international decision-making bodies have only had a minor brush with the issue. Treaties do not deal with the institution of the jury, as they leave it to each state to decide on appropriate modes of trial. Jury selection issues have come before international decision-making bodies, however. Juries are used in a number of countries, and persons convicted by a jury have on occasion complained to an

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 30.

⁸¹ *Id.*

⁸² Neil Vidmar, *A Historical and Comparative Perspective on the Common Law Jury*, in *WORLD JURY SYSTEMS* 33 (Neil Vidmar ed., 2000).

⁸³ *Id.* at 36.

international body about jury selection in their case. However, relevant international practice is to be found in cases involving capital punishment, whether tried before a jury or judges, and in non-capital cases raising the impartiality of a tribunal composed of judges. This international practice is relevant to elaborating an international-law position on death-qualification.

The only case to date to raise the issue of the death-qualification process at the international level is the *Celestine* case, decided by the Inter-American Commission on Human Rights, and involving a man convicted by a jury and sentenced to death in Louisiana.⁸⁴ At the time of filing, *Celestine* was scheduled to be executed, having been convicted by death-qualified jury. The Inter-American Commission on Human Rights is a subsidiary body of the Organization of American States, empowered to entertain complaints of human rights violations committed by OAS member states. As viewed by U.S. courts, its decisions do not have the binding force of a legal determination, but rather constitute advice to member states on their compliance.⁸⁵

"The process of death qualification," read the complaint, "denies capital defendants the right to an impartial hearing and to equal treatment under the law." The equal treatment argument was based on the factual premise, recited in the complaint, that "[d]eath qualification frequently results in the exclusion of blacks and women from jury service because these groups more frequently hold scruples against the death penalty than do white males. This factor significantly contributes to the lack of impartiality in death qualified juries."⁸⁶

In response, the United States, represented by the Department of State, argued that there is no right to a jury trial in the inter-American system, that *Celestine* had the option of a bench trial, and therefore that he could not complain about being tried by an allegedly partial jury.⁸⁷ The Department of State characterized as "unsubstantiated" the claim that death-qualification excludes a disproportionate number of blacks and women.⁸⁸

The Inter-American Commission decided against *Celestine* but did not make clear its basis rejecting his death-qualification argument. The *Celestine* complaint had argued death-qualification as only one of two grounds. The other was that capital punishment was, based on statistical studies, imposed in the United States in a racially discriminatory manner, and that this fact negatively impacted *Celestine*, who was black and was convicted of killing a person who was white. In responding to the two grounds, the commission did not clearly distinguish them.

⁸⁴ State v. *Celestine*, 443 So. 2d 1091 (La. 1983).

⁸⁵ Garza v. Lappin, 253 F.3d 918, 925 (7th Cir. 2001).

⁸⁶ Individual Complaint to the Inter-American Commission on Human Rights on Behalf of Willie Lawrence *Celestine* (S. Adele Shank and Bert Lockwood, Complainants), at 5 [hereinafter Individual Complaint].

⁸⁷ Memorandum of the United States to the Inter-American Commission on Human Rights in Case 10.031 (Willie L. *Celestine*), Jan. 21, 1988, at 5.

⁸⁸ *Id.*

In the paragraphs of its opinion in which it decided against Celestine's petition, it responded only to the statistical argument about racial discrimination.⁸⁹

International practice relevant to the death-qualification issue is found in three directions. First, there is decisional law relating to juror bias. Juries are used in a number of countries.⁹⁰ Guilty verdicts rendered by a jury have been assessed under international standards. Issues of jury selection or the views of individual jurors have figured in a handful of cases.

Second, international decisions have focused on capital punishment and specifically the level of procedural safeguards required. Third, international decisions have been rendered on the international guarantee of trial by an impartial tribunal, though most of these cases are based on trials conducted without a jury.

This section considers the few cases that have been decided on jury selection and juror bias. One was decided by the Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights.⁹¹ If member states ratify a special protocol to the Covenant, individuals may file complaints against them.⁹² A man convicted of murder and sentenced to death in Mauritius took a complaint to the Committee. In Mauritius at the time, only men served on juries. The man argued that this exclusion violated the right of women to equality, in violation of Covenant Articles 3 and 26, which prohibit discrimination based on sex. He referred as well to Covenant Article 25, which guarantees women a right to participate in public service. The Committee rejected the complaint, stating that the man had not shown "how the absence of women on the jury actually prejudiced the enjoyment of his rights under the Covenant."⁹³ The Mauritius case involved no facts that the Committee viewed as affecting the fairness of the decision rendered by the jury.

A case from Norway raised the question of juror bias manifested during trial. This case was decided by the Committee on the Elimination of Racial Discrimination, which monitors compliance with the International Convention on the Elimination of All Forms of Racial Discrimination.⁹⁴ The committee hears complaints against those states party to the Convention that make a declaration

⁸⁹ Case 10.031, Inter-Am. C.H.R. ¶ 45, OEA/ser. L/v/II. 77, doc. 7, rev. 1 (1989), available at <http://www.cidh.oas.org>.

⁹⁰ See generally WORLD JURY SYSTEMS (Neil Vidmar ed., 2000).

⁹¹ International Covenant on Civil and Political Rights Dec. 16, 1966, art. 28, 999 U.N.T.S. 171, 179.

⁹² Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 1, 999 U.N.T.S. 302, 302.

⁹³ *Poongavanam v. Mauritius*, U.N. Human Rts. Comm., 51st Sess., U.N. Doc. CCPR/C/51/D/567/1991 (1994); cf. *Holland v. Illinois*, 493 U.S. 474 (1990) (rejecting claim of capital defendant that he was denied right to trial by jury where prosecutor used peremptory challenges to exclude all African-Americans in the venire).

⁹⁴ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 8, 660 U.N.T.S. 195, 224.

submitting themselves to this process.⁹⁵ A Tamil man, born in Mauritius but naturalized as a Norwegian, was convicted in Norway of drug trafficking and sentenced to a term of imprisonment.⁹⁶ In his complaint, the man asserted that two jurors had been biased against him on grounds of race, and that this bias deprived him of equal treatment under the law.⁹⁷

The man's evidence of bias was that, during a break in the trial, a law student had overheard two women jurors in conversation. One of the women was heard to say that the accused should not have been receiving welfare payments in Norway, and that he should be deported.⁹⁸ Defense counsel, apprised of the conversation, asked the court to dismiss the juror. The court took evidence from the law student and the two women but decided not to dismiss the juror, on the grounds that her statement did not relate to the guilt of the accused but represented only an expression of her personal opinion.⁹⁹

Before the Committee, counsel for the man argued that the testimony the juror gave when the court took evidence reflected bias on her part and may have influenced her vote to convict.¹⁰⁰ Norway defended the court's refusal to dismiss the juror, pointing out that the juror earned less at her job than the accused received by way of welfare, and that her remarks therefore were "a not very surprising reaction to a matter that must have seemed unjust to her."¹⁰¹

The Committee said that "the statement [of the juror] may be seen as an indication of racial prejudice." Referring to Article 5(a) of the Convention, which guarantees a right to equal treatment before courts of law, it said, "the Committee is of the opinion that this remark might have been regarded as sufficient to disqualify the juror."¹⁰² It decided, however, to defer to the Norwegian courts in their handling of the matter and declined to find the verdict improper.

Nonetheless, the Committee suggested to Norway that "every effort should be made to prevent any form of racial bias from entering into judicial proceedings which might result in adversely affecting the administration of justice on the basis of equality and non-discrimination."¹⁰³

Both of these cases were argued under the guarantee of equality before the law, rather than the guarantee of trial by an impartial tribunal. They suggest,

⁹⁵ *Id.* at art. 14.

⁹⁶ *Narrainen v. Norway*, U.N. Human Rts. Comm. 44th Sess., U.N. Doc. CERD/C/44/D/3/1991 at ¶ 2.1 (1994).

⁹⁷ *Id.* at ¶ 2.1.

⁹⁸ *Id.* at ¶ 2.4.

⁹⁹ *Id.* at ¶ 2.5.

¹⁰⁰ *Id.* at ¶ 8.7.

¹⁰¹ *Id.* at ¶ 7.2.

¹⁰² *Id.* at ¶ 9.4.

¹⁰³ *Id.* at ¶ 10.

nonetheless, that issues relating to juror selection and bias may raise questions under international standards.

VIII. INTERNATIONAL STANDARDS ON CAPITAL DUE PROCESS

In U.S. procedural law, one finds recognition, despite the upholding of death-qualification, that extra care must be taken in capital cases. The standard of proof for imposition of a capital sentence is, in some jurisdictions, even higher than proof beyond a reasonable doubt.¹⁰⁴ Convictions and sentences in death cases are typically subjected to a heightened standard of appellate review.¹⁰⁵ Appellate courts compare the imposition of a death sentence in the particular case with the run of death sentences in the jurisdiction.¹⁰⁶ The U.S. Supreme Court referred to the need "that capital punishment be imposed fairly, and with reasonable consistency, or not at all."¹⁰⁷ Justice Blackmun wrote, "There is a heightened need for fairness in the administration of death. This unique level of fairness is born of the appreciation that death truly is different from all other punishments a society inflicts upon its citizens."¹⁰⁸

International standards reflect a view that in a death case particular care must be taken to avert errors that might result in executing those who, by the law in the jurisdiction, should not be executed. These standards have been expressed somewhat differently, however, from those in domestic U.S. law. In some ways, they are stricter than those found in U.S. law. In particular, international decision-making bodies voice greater skepticism than do U.S. courts about the legality of capital punishment in principle, and this view leads them to require great care in providing procedural safeguards in capital cases. This approach is seen in a ruling of the Human Rights Committee when it was presented with a case involving the legality of extradition from Canada to the United States. A person located in Canada was sought by the United States on a capital charge. Canada had no capital punishment domestically. The Committee decided that any state that itself has abolished capital punishment violates the International Covenant on Civil and Political Rights if it extradites to a country that seeks the person on a capital charge.¹⁰⁹

¹⁰⁴ Treadway, *supra* note 43, at 215.

¹⁰⁵ See, e.g., OHIO REV. CODE ANN. § 2929.05 (Anderson 2004).

¹⁰⁶ Gregg v. Georgia, 428 U.S. 153, 198 (1976).

¹⁰⁷ Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

¹⁰⁸ Callins v. Collins, 510 U.S. 1141, 1149 (1993) (Blackmun, J., dissenting from denial of petition for writ of certiorari).

¹⁰⁹ Judge v. Canada, U.N. Human Rts. Comm., 78th Sess., U.N. Doc. CCPR/C/78/D/829/1998 (2003).

On another occasion the Committee said that, in capital cases, the procedural guarantees provided in the International Covenant “must be observed, including the right to a fair hearing by an independent tribunal”¹¹⁰

In a case involving procedural rights in capital cases, the Inter-American Court of Human Rights noted the tendency towards abolition of capital punishment and said that that tendency “translates into the internationally recognized principle whereby those States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases If the due process of law, with all its rights and guarantees, must be respected regardless of the circumstances, then its observance becomes all the more important when that supreme entitlement every human rights treaty and declaration recognizes and protects is at stake: human life.”¹¹¹

In another case involving a capital prosecution, the Inter-American Court of Human Rights said, to the same effect: “Taking into account the exceptionally serious and irreparable nature of the death penalty, the observance of due process, with its bundle of rights and guarantees, becomes all the more important when human life is at stake.”¹¹²

The U.N. Economic and Social Council, in a resolution titled Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, approved a set of procedural guarantees that had been recommended by the U.N. Committee on Crime Prevention and Control. One safeguard reads: “Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.”¹¹³

Similarly, the European Court of Human Rights, which monitors compliance with Europe’s regional human rights treaty,¹¹⁴ has said, “Because execution of the death penalty is irreversible, the strictest and most rigorous enforcement of judicial guarantees is required of the State so that those guarantees are not violated and a human life not arbitrarily taken as a result.”¹¹⁵

¹¹⁰ U.N. GOAR, 37th Sess., Supp. No. 40, at 93, U.N. Doc. A/37/40 (1982).

¹¹¹ The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Inter-Am. Ct. H.R. (ser. A) no. 16, at ¶ 135, Adv. Op. OC-16/99 (1999), available at http://www.corteidh.or.cr/serieapdf/seriea_16_esp.pdf.

¹¹² *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Inter-Am. Ct. H.R. (ser. C) no. 94, at 55 ¶ 148 (2002), available at http://www.corteidh.or.cr/seriec/seriec_94_esp.doc.

¹¹³ U.N. ESCOR, 1984 Sess., Supp. No. 1, at 33, Annex art. 5, U.N. Doc. E/1984/50 (1984).

¹¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 19, 213 U.N.T.S. 222, amended by Protocol No. 11, May 11, 1994, 155 Europ. T.S. No. 1 (entered into force Nov. 1, 1998), available at <http://www.echr.coe.int/convention/webconveneng.pdf>.

¹¹⁵ *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R., ¶ 63 (2003), available at <http://cmiskp.echr.coe.int> (quoting The Right to Information on Consular Assistance in the

None of these expressions of concern about procedure in capital cases was made upon a consideration of death-qualification. However, they were made with regard to procedures generally and therefore are relevant to assessing death-qualification.

IX. INTERNATIONAL STANDARDS ON IMPARTIALITY OF A TRIBUNAL

The international guarantee most clearly relevant to the practice of death-qualification is the guarantee of trial by an impartial tribunal. As indicated, capital defendants have argued this right in challenging death-qualification in U.S. courts.¹¹⁶ The right to trial by an impartial tribunal has recently been invoked against the United States in another context. President George Bush announced plans to use specially constituted military commissions to try persons detained in Afghanistan on terrorism-related charges.¹¹⁷ At the time, Spain had recently arrested a number of persons on suspicion of involvement in the airplane attacks that occurred in the United States on September 11, 2001. The Government of Spain announced that it would not extradite suspects to the United States if they might be tried before such commissions. It cited concern over the impartiality of these commissions.¹¹⁸

The right to an impartial tribunal has been read broadly. In the *Golder* case, the European Court of Human Rights read it to include a right of access to courts, even though access to courts is not mentioned in the European Human Rights Treaty, which speaks only of a right to a hearing before “an independent and impartial tribunal.”¹¹⁹ *Golder* was a UK prison inmate who had been denied the right to contact a solicitor. *Golder* wanted a solicitor to explore the possibility of filing suit for libel against a prison employee who made accusations that hurt *Golder*’s chance for release from prison on parole.¹²⁰ The UK argued that the right to trial before an impartial tribunal is implicated only when a case is before a tribunal.¹²¹

The European Court of Human Rights rejected the UK’s narrow reading of the right to an impartial tribunal. It acknowledged that the provision on an impartial tribunal “does not state a right of access to the courts or tribunals in

Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Oct. 1, 1999, Inter-Am. C.H.R. (Ser A) No. 16 (1999), ¶ 136).

¹¹⁶ See Individual Complaint, *supra* note 86.

¹¹⁷ *President Bush’s Order on the Trial of Terrorists by Military Commission*, N.Y. TIMES, Nov. 14, 2001, at B8.

¹¹⁸ David J. Scheffer, *Reality Check on Military Commissions*, CHRISTIAN SCI. MONITOR, Dec. 10, 2001, at 11.

¹¹⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6(1), 213 U.N.T.S. 222.

¹²⁰ *Golder Case*, 18 Eur. Ct. H.R. (ser. A) at 10 (1975).

¹²¹ *Id.* at 11.

express terms,”¹²² but said that if one has a right to a hearing before an impartial tribunal, one must also have a right to approach the tribunal.¹²³

On the issue of the identity of the decision-maker as an ingredient of the impartiality of a tribunal, the European court of Human Rights has found that the obligation to provide an impartial tribunal may be breached even if it cannot be shown that the particular decision-maker was lacking in objectivity. Information about the general run of decision-makers of a category that includes the particular decision-maker may suffice to conclude that a tribunal was not impartial.

The Court has found to this effect in cases from Turkey, in which one military judge sat as a member of a three-member judicial panel, the other two members being civilian judges. Such panels were used in special state security courts to try civilians on terrorism-related charges. The European court said that certain aspects of the status of the military judges raised doubt as to their independence and impartiality. As a result, said the European court, the accused “had legitimate cause to fear that the presence of a military judge on the bench might have resulted in the courts allowing themselves to be unduly influenced by considerations that were not relevant to the nature of the case.”¹²⁴

The European court acknowledged that, under the Turkish procedure, the military judge was a career judicial officer whose qualifications were equal to those of civilian judges, and that, by Turkish law, the independence of a military judge was assured.¹²⁵ The rationale for their inclusion in terrorism-related cases was that they had special expertise in such matters.¹²⁶ The European court found the participation of the one military judge to violate the guarantee of an impartial tribunal because the military judges were members of the army, “which in turn takes its orders from the executive.”¹²⁷ Further, “they remain subject to military discipline and assessment reports are compiled on them by the army for that purpose,” they are appointed by higher army personnel, and their term of office as a military judge is only four years, subject to renewal.¹²⁸

In determining whether the participation of these judges violated the guarantee of an impartial tribunal the European court put itself in the shoes of the accused: “In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society just inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.”¹²⁹

¹²² *Id.* at 13.

¹²³ *Id.* at 18.

¹²⁴ *Öcalan v. Turkey*, App. No. 46221/99, Eur. Ct. H.R., ¶ 144 (2003).

¹²⁵ *Incal v. Turkey*, 1998–IV Eur. Ct. H.R. 1547, 1571.

¹²⁶ *Id.* at 1572.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 1572–73.

The European court looked to objectively verifiable circumstances. In one case involving the Turkish security courts, it said that the accused "could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge, it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, Mr. Ciraklar's fears as to that court's lack of independence and impartiality can be regarded as objectively justified."¹³⁰

These cases decided by the European court did not involve juries. Nonetheless, they reflect a broad scope for the guarantee of trial by an impartial tribunal. The U.S. Supreme Court in *Lockhart* said that the studies done on the issue are equivocal.¹³¹ By taking that approach, the U.S. Supreme Court, without so saying, required an affirmative demonstration of unfairness. The court did not require the government to demonstrate that its process was fair. With capital punishment, strict observance of procedural regularity is required.

X. USE OF INTERNATIONAL PRACTICE BY THE JUDICIARY

International standards can play a role in several different ways. States take up an issue, based on international standards, and use it in the public arena, thereby putting pressure on a state. The statements referenced above by Spain regarding U.S. military commissions provide an example.¹³² The United States has been subjected to considerable political pressure from other states of the world over its use of capital punishment. While the impact of such criticism is hard to assess and may be indirect, it nonetheless has the potential of influencing behavior.¹³³

Additionally, international standards could potentially impact the United States if death-qualification as practiced in the United States is brought before an international decision-making body. They could also impact the United States through decisions of U.S. state or federal courts. Domestic courts could find death-qualification to violate the International Covenant and to invalidate it on that basis. To do so, they would have to determine that death-qualification violates international standards as a matter of customary international law,¹³⁴ or under the International Covenant. Assessing death-qualification under the International Covenant, the courts would also have to determine that its standards are domestically applicable, in the face of a declaration made by the U.S. Senate that the International Covenant's operative provisions are not self-executing. This

¹³⁰ *Ciraklar v. Turkey*, 1998-VII Eur. Ct. H.R. 3059, 3073-74.

¹³¹ *Lockhart v. McCree*, 476 U.S. 162, 172 (1986).

¹³² See Scheffer, *supra* note 118.

¹³³ John Quigley, *Execution of Foreign Nationals in the United States: Pressure from Foreign Governments Against the Death Penalty*, 4 ILSA J. INT'L & COMP. L. 589 (1998).

¹³⁴ *The Paquete Habana*, 175 U.S. 677 (1900).

issue has yet to be resolved by the Supreme Court and has not been given full consideration by state courts or lower federal courts.¹³⁵

U.S. courts might also consider international standards in determining the constitutionality of death-qualification if the constitutionality of the practice were to be raised anew before it. The question of the relevance of international standards in making due process or other constitutional assessments is controversial. The issue has arisen in the context of capital cases.

In 1987, the U.S. Supreme Court referred to international and foreign practice in deciding whether the execution of a person who was fifteen years old at the time of the crime so violated notions of decency as to constitute "cruel and unusual punishment."¹³⁶ In a plurality opinion, four justices, addressing the question of whether such use of capital punishment violated notions of decency, referred both to the European practice of prohibiting capital punishment for juveniles, and to a comparable prohibition in the International Covenant on Civil and Political Rights, which at the time the United States had yet to ratify, and in the Geneva Civililians Convention, which it had ratified.¹³⁷ The Court found it constitutionally invalid to execute a person who was fifteen at the time of the offense.¹³⁸

In 1989, however, addressing a similar issue, the U.S. Supreme Court eschewed reliance on international and foreign practice. The Court had to decide whether the execution of persons aged sixteen or seventeen when they committed their crimes constituted "cruel and unusual punishment." Capital punishment for persons of such age is widely rejected abroad. The Court said, however, that the practice did not violate U.S. notions of decency and upheld it.¹³⁹

Justice Scalia applauded this trend.¹⁴⁰ Scalia stated that in the 1989 case the Court rejected the idea "that the sentencing practices of other countries are relevant."¹⁴¹ He said that the approach reflected in the earlier cases "was short-lived and has now been retired."¹⁴² To prove this latter assertion, Scalia quoted from the 1989 case, in which the court said, "it is American conceptions of decency that are dispositive."¹⁴³

¹³⁵ Cf. *Maria v. McElroy*, 68 F. Supp. 2d 206, 231–32 (E.D.N.Y. 1999) (applying an operative provision of International Covenant); *Iguarta De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (finding operative provisions of International Covenant inapplicable); see also John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555, 579–85 (1998) (arguing that the operative provisions of the International Covenant are applicable in U.S. courts).

¹³⁶ *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

¹³⁷ *Id.* at 830–31.

¹³⁸ *Id.* at 838.

¹³⁹ *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

¹⁴⁰ Antonin Scalia, *Program V: Commentary*, 40 ST. LOUIS U. L.J. 1119, 1121 (1996).

¹⁴¹ *Id.* at 1121 (quoting *Stanford v. Kentucky*, 494 U.S. 361, 369 n.1 (1989)).

¹⁴² *Id.*

¹⁴³ *Id.*

To support his view that international and foreign practice should be irrelevant, Scalia said that judges apply the laws that the people of their country deem appropriate. "We are not some international priesthood empowered to impose upon our free and independent citizens supra-national values that contradict their own."¹⁴⁴ The trend applauded by Justice Scalia was bemoaned by retired Justice Harry Blackmun. Blackmun wrote, "[T]he Supreme Court has recently shown something less than 'a decent respect to the opinions of mankind.'"¹⁴⁵

In a more recent case, the Court once again showed willingness to consider international practice as it decided a constitutional case involving capital punishment. The Court ruled unconstitutional the execution of the mentally retarded.¹⁴⁶ The majority opinion cited a brief authored by the European Union on the issue and stated that "within the world community the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."¹⁴⁷

XI. ELIMINATING THE USE OF DEATH-QUALIFICATION

Witherspoon and *Lockhart* were decided before the judiciary became aware of the frequency of improper convictions. In *Quiñones*, the district court gave voice to a strong body of opinion that developed in the wake of DNA-based reversals of convictions, and the revelation of death sentences against the innocent in Illinois, that fundamental flaws exist in the administration of capital punishment in the United States.¹⁴⁸

In *Witherspoon* and *Lockhart*, the Supreme Court assumed that capital punishment was imposed by juries in a fashion that, while there might be occasional errors, was fundamentally fair. That assumption is not tenable in the face of information that has become available in recent decades. If the Court is to justify death-qualification as preserving the integrity of the capital punishment system, it must address that latter issue. It must ask itself whether allowing trial by a jury that may be biased is justified in light of the now known consequences of capital trials.

A number of systemic factors may play a role in improper convictions. Whether death-qualification plays a significant role in that regard cannot readily be determined with scientific precision. Nonetheless, there is reason to believe that many juries in capital cases convict persons against whom the evidence of commission of a capital offense does not rise to the level of proof beyond a

¹⁴⁴ *Id.* at 1122.

¹⁴⁵ Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 40 (1994).

¹⁴⁶ *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

¹⁴⁷ *Id.*

¹⁴⁸ *United States v. Quiñones*, 313 F.3d 49, 63–65 (2d Cir. 2002).

reasonable doubt, and that such juries impose capital punishment in circumstances in which it might not be imposed by a more typical jury. A Pennsylvania trial lawyer wrote of death-qualification in 1959: "in the most important criminal cases, to wit, murder, the jury consists of hard headed, ultra conservative people, and, in effect, the defense must prove innocence beyond all doubt."¹⁴⁹

Death-qualification is a major suspect in the incidence of improper convictions. The counter-argument to eliminating death-qualification is that capital punishment cannot be administered at all if some jurors are so opposed to capital punishment that they will not, at the sentencing phase, recommend death, and that they will not, at the guilt phase, vote to convict.

This situation would be no worse for the government, however, than was true in England for the centuries in which capital punishment was used, and used for a wider range of crime than is presently the case in the United States. The purpose of juries is to bring to bear the sense of the community. If that sense is divided, the system calls for a decision in the direction of leniency, since there is not community sentiment in favor of a death sentence.

Witherspoon and *Lockhart* were decided before the Supreme Court, at least some of its members, began to consider international standards as relevant to their decisions on constitutionality, in particular in capital criminal cases. What is lacking in the U.S. Supreme Court analysis is reference to a consideration found crucial by the European Court of Human Rights, namely, the appearance to an accused that he or she is being tried, and perhaps sentenced to death, by a tribunal that is not impartial. Although, as indicated, the European court said that the concerns of an accused must be justified by objective circumstances, this consideration is critical to a system of justice. If a person sentenced to death in the United States can, after being sentenced, point to the character of the jury as less impartial than an ordinary criminal jury, then the confidence in impartiality that one expects in criminal law may be lacking.

The international standard requires trial by an impartial tribunal. It is doubtful that a tribunal is "impartial" when those most likely to find in favor of the accused are excluded. The norm on impartiality of a tribunal, applied with the scrupulousness required in capital cases, would seem to require that jurors not be excluded for being death-scrupled. It is not consistent with these two norms to allow a procedure involving significant risk of unfairness.

¹⁴⁹ Lindley R. McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania*, 30 PA. BAR ASS'N. Q. 252, 258 (1959).

